CHADBOURNE
& PARKE

Kemal Hawa
direct tel 202-974-5645
khawa@chadbourne.com

DOCKET FILE COPY ORIGINAL

ORIGINAL

December 5, 2003

RECEIVED

DEC - 5 2003

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th St S W.
Washington, DC 20554

Re. In the matter of Business Options, Inc , Order to Show Cause, EB-Docket No 03-85, File No EB-02-TC-151, NAL/Acct No 200332170002, FRN 0007179054

Dear Ms Dortch.

Enclosed for filing in the above-referenced docket are an original and (6) six copies of Business Options, Inc.'s Opposition to the Enforcement Bureau's November 21, 2003 Motion Should you have any questions regarding this filing please do not hesitate to contact us

Very truly yours,

Kemal Hawa

Dana Frix
Kemal Hawa

Enclosures

cc Hon Richard L Sippel (w/encls.)
David H Solomon, Esq , FCC/Enforcement Bureau (w/encls)
Maureen F Del Duca, Esq , FCC/Enforcement Bureau (w/encls)
James W Shook, Esq., FCC/Enforcement Bureau (w/encls)
Trent Harkrader, Esq., FCC/Enforcement Bureau (w/encls)
Peter G Wolfe, Esq., FCC/Enforcement Bureau (w/encls.)

No of Copies rec'd 0+6
List ABCDE

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D C 20554

In the Matter of	)	EB Docket No 03-85
	)	
Business Options, Inc	)	File No. EB-02-TC-151
	)	NAL/Acct No 30033217002
Order to Show Cause and	)	FRN 0007179054
Notice of Opportunity for Hearing	)	

To: Chief Administrative Law Judge
Richard L. Sippel

Business Options, Inc.'s Opposition to the Enforcement Bureau's November 21, 2003 Motion

Dana Frix
Kemal Hawa
Chadbourne & Parke LLP
1200 New Hampshire Ave NW
Washington, DC 20036
(202) 974-5600 (phone)
(202) 974-5602 (fax)

Counsel for Business Options, Inc

December 5, 2003

TABLE OF CONTENTS

Page

Summary 1

Introduction 1

Background 3

I The Motion Does Not Satisfy the Administrative Procedure Act's Notice Requirements and Violates Fundamental Principles of Fairness 8

II The Motion Impermissibly Seeks to Retroactively Apply a Commission Policy Change 11

III The Motion Is An Untimely Motion to Enlarge or Change an Issue, and the Enforcement Bureau Has Utterly Failed to Satisfy the Test for its Consideration 13

IV. The Globcom NAL Is Not a Final Order and Cannot Be Used as a Precedent 17

V. The Globcom NAL Contains Significant Errors That May Result in Its Dismissal, and Certainly Render it Unusable in This Case 19

VI. The Proposed Increase in the Base Forfeiture Amount is Not Warranted in This Case, and Would Also Be Arbitrary, Capricious and Excessive 21

Conclusion 24

Attachment-Transcript

SUMMARY

On November 21, 2003, the Enforcement Bureau filed a Motion seeking to retroactively impose the Federal Communications Commission's newly announced forfeiture standard for failure to contribute to federal universal service and telecommunications relay services support mechanisms on Business Options, Inc (the "Motion")

The Motion violates the notice requirements of the Administrative Procedure Act as well as the fundamental principles of fairness that those notice requirements were designed to protect. In addition, retroactive imposition of the recently articulated standard would contravene the general proscription against retroactive imposition of rules and policies.

The Enforcement Bureau's Motion is, and can only be, a Motion to enlarge or change an issue under Section 1.229 of the Commission's rules, and the Enforcement Bureau has utterly failed to satisfy the requirements of that rule.

The notice of apparent liability on which the Enforcement Bureau relies does not constitute a final order and thus cannot be relied upon as precedent as a matter of law. This notice of apparent liability also contains significant errors that may result in its dismissal, and certainly renders it unusable in this case Finally, the proposed increase in the forfeiture amount is not warranted in this case, and would also be arbitrary, capricious and excessive.

The Motion should be denied.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D C. 20554

In the Matter of	)	EB Docket No. 03-85
	)	
Business Options, Inc	)	File No. EB-02-TC-151
	)	NAL/Acct. No. 30033217002
Order to Show Cause and	)	FRN: 0007179054
Notice of Opportunity for Hearing	)	

To Chief Administrative Law Judge
Richard L. Sippel

Business Options, Inc.'s Opposition to the Enforcement Bureau's November 21, 2003 Motion

Business Options, Inc. ("Business Options"), by its counsel, hereby submits its Opposition to the Enforcement Bureau's November 21, 2003 motion, which the Enforcement Bureau styled a "Motion to Clarify Issue (j)" (the "Motion").

Introduction

The Motion suffers from multiple procedural and substantive flaws, and accordingly should be denied.

First, the Motion violates the notice requirements of the Administrative Procedure Act ("APA") as well as the fundamental principles of fairness that those notice requirements were designed to protect.

Second, retroactive imposition of the *Globcom NAL* (defined herein) would contravene the general proscription against retroactive imposition of rules and policies

Third, despite the Enforcement Bureau's transparent attempt to opt-out of the Commission's *Hearing Proceeding Rules*[1] governing this proceeding, the Motion is, and can only be, a Motion to enlarge or change an issue under Section 1.229 of the Commission's rules,[2] and the Enforcement Bureau has utterly failed to satisfy the requirements of that rule. Counsel for the Enforcement Bureau expressly conceded in a November 5, 2003 hearing in this proceeding "that was set ***purely at the request*** of the Enforcement Bureau" (the "*November 5th Hearing*")[3] that in the notice of apparent liability on which the Motion seeks to rely (the "*Globcom NAL*"),[4] the Commission announced a significant policy change that the Enforcement Bureau seeks to retroactively apply to this case It is disingenuous for the Enforcement Bureau to suggest that its Motion is a mere clarification of anything, when it already admitted that the Motion seeks to retroactively apply a significant policy change announced by the Commission in the *Globcom NAL*

Fourth, notices of apparent liability do not constitute final orders and thus cannot be relied upon as precedent as a matter of law

---

1 *See* 47 C.F R. §§ 1.201 *et seq* (2002).

2 *See* 47 C.F R § 1 229 (2002)

3 *See* Transcript of November 5, 2003 Hearing, *Business Options, Inc.*, Order to Show Cause, at 12 (emphasis added), attached hereto ("*Transcript*")

4 *See Globcom, Inc d/b/a/ Globcom Global Communications, Apparent Liability for Forfeiture*, File No. EB-02-IH-0757, NAL Acct No. 200332080015, Notice of Apparent Liability for Forfeiture and Order, FCC 03-231 (rel Sept. 30, 2003) (*Globcom NAL*)

Fifth, the *Globcom NAL* contains significant errors that may result in its dismissal, and certainly render it unusable in this case

Finally, the proposed increase in the Base Forfeiture (defined herein) amount in the *Globcom NAL* is not warranted in this case, and would also be arbitrary, capricious and excessive

Background

On April 7, 2003, the Commission released its *Show Cause Order* in this proceeding[5] alleging, among other things, that Business Options failed to file the required Telecommunications Reporting Worksheets with the National Exchange Carrier Association ("NECA") (FCC Forms 499-A, 499-Q, and 457), in willful or repeated violation of Section 64 1195 of the Commission's rules [6] Telecommunications Reporting Worksheets are forms on which carriers report their interstate and international telecommunications revenues to NECA which passes the information on to the Universal Service Administrative Company ("USAC"), the company to which the Commission has delegated responsibility for managing federal universal service funding mechanisms, and the telecommunications relay service ("TRS") fund, which manages TRS contributions and payments.

---

[5] *See Business Options, Inc* , Order to Show Cause, 18 FCC Rcd 6881 (2003) ("*Order to Show Cause*")

[6] *See id* at ¶¶ 27-28.

On July 15, 2003, the Enforcement Bureau filed a *Motion to Enlarge Issues* in this proceeding, in which it sought to add an issue to those raised in the original *Show Cause Order*.[7] Specifically, the Enforcement Bureau alleged in its *Motion to Enlarge Issues* that Business Options not only failed to report its revenues in its Telecommunications Reporting Worksheets, but also failed concomitantly to contribute to universal service and TRS funding mechanisms. For the purposes of clarity, this would be analogous to the Internal Revenue Service first alleging that a taxpayer failed to file tax returns, and then amending the complaint to further allege that the taxpayer failed to pay required taxes pursuant to those same tax returns.

Despite the fact that a serious question existed as to whether the *Motion to Enlarge Issues* should be accepted for filing (the motion was filed out of time and the Enforcement Bureau failed to show that the reason for the late filing was due to newly discovered evidence), Business Options made an internal decision not to contest the *Motion to Enlarge Issues* for a variety of reasons, including resource limitations and a desire to demonstrate good faith and contrition to the Commission. Business Options acknowledged that it failed to file required Telecommunications Reporting Worksheets and contribute to universal service and TRS funding mechanisms. The evidence is clear that Business Options was simply unaware of the filing and contribution requirements until mid-2002. Rather than engage in a fight with the Enforcement Bureau on purely procedural grounds Business Options decided not to contest the *Motion to*

---

[7] *See* Motion to Enlarge Issues.

Enlarge Issues and instead committed to comply with its reporting and contribution obligations. The *Motion to Enlarge Issues* was granted on August 20, 2003 [8]

On September 30, 2003, the Commission issued the *Globcom NAL* in which the Commission announced a significant policy change in the enforcement action it intends to take against carriers that fail to contribute to universal service and TRS mechanisms (again, counsel for the Enforcement Bureau conceded in open court that the *Globcom NAL* represents a Commission policy change, so that issue is not contested between the parties) By way of background, in a series of cases, the Commission has set forth its methodology for imposing forfeitures on carriers that fail to properly contribute to federal universal service support mechanisms. [9] The prevailing methodology has been as follows: a base forfeiture of $40,000

---

[8] *See Business Options, Inc* , Memorandum Opinion and Order, FCC 03M-33 (rel Aug. 20, 2003)

[9] *See e g ,*

- *PTT Telekom, Inc* , Notice of Apparent Liability for Forfeiture, 16 FCC Rcd 7477 (2001) ("*PTT Telekom*") (seeking a base forfeiture penalty of $40,000, plus approximately one-half of the unpaid universal service contribution for two representative months, for willful and repeated violations of its obligation to contribute to universal service support programs, with an upward adjustment of $45,500, failure involved a contribution shortfall of approximately $925,000);

- *North American Telephone Network, LLC*, 15 FCC Rcd 14022 (2000) ("*North American Telephone Network*") (seeking a base forfeiture penalty of $40,000, plus approximately one-half of the unpaid universal service contributions for two months; failure involved a contribution shortfall of over $800,000);

(Cont'd on following page)

($20,000 for each "of two months of nonpayment") ("Base Forfeiture"),[10] plus ***"an amount that is approximately one half of the unpaid universal service contributions for two representative months."***[11] In the *Globcom NAL*, the Commission departed from precedent by (i) proposing to dramatically increase its standard base forfeiture from $40,000 to $240,000, and (ii) imposing a penalty amount one half of ***all outstanding unpaid universal service amounts*** (not just two months) Although the Commission misquoted and misapplied its own precedent in a way that

---

(Cont'd from preceding page)

- *America's Tele-Network Corp* , Notice of Apparent Liability for Forfeiture, 15 FCC Rcd 20903 (2000) ("*America's Tele-Network Corp* ") (seeking a base forfeiture penalty of $40,000, plus one half of the unpaid universal service contributions for two months, plus an upward adjustment of $51,329, failure involved a shortfall of $964,808 52),
- *Intellicall Operator Services*, Notice of Apparent Liability for Forfeiture, 15 FCC Rcd 13539 (2000) ("*Intellicall*") (seeking a base forfeiture penalty of $40,000, plus one-half of the unpaid universal service contribution for two months, plus a downward adjustment of $130,613, failure involved a contribution shortfall of over $2 million),
- *Matrix Telecom, Inc* , 15 FCC Rcd 13544 (2000) ("*Matrix*") (seeking a base forfeiture penalty of $40,000, plus one-half of the unpaid universal service contributions for two months, plus a downward adjustment of $76,614, failure involved a shortfall of over $1 million); and
- *ConQuest Operator Services Corp* , Notice of Apparent Liability for Forfeiture, 13 FCC Rcd 16075 (1998) ("*Conquest*") (seeking a base forfeiture penalty of $20,000, plus one-half of the unpaid universal service contributions for one month, failure involved a shortfall of over $750,000). *See also ConQuest Operator Services Corp* , Order of Forfeiture, 14 FCC Rcd 12518, 12524 at ¶ 13 ("*Conquest Order*").

[10] *See Globcom NAL* at ¶ 25

[11] *See PTT Telekom* at 7479 ¶ 7 *See also Intellicall* at 13541-13542 ¶ 8, *America's Tele-Network Corp* at 20906 ¶ 9, *Matrix* at 13546-13547 ¶ 8; and *North American Telephone Network* at 14024-14025 ¶ 9.

would also result in a dramatic increase in the standard additional penalty this error may have been inadvertent [12]

The Enforcement Bureau in this case seeks to retroactively apply the *Globcom NAL* to this case, even though the *Globcom NAL* was issued six months after the *Show Cause Order* was released, two and one-half months after the *Motion to Enlarge Issues* was filed, and more than a month after it was granted.

Argument

The Motion is deficient in many ways First, the Motion violates the notice requirements of the APA as well as the fundamental principles of fairness that those notice requirements were designed to protect Second, retroactive imposition of the *Globcom NAL* would contravene the general proscription against retroactive imposition of rules and policies, and the Enforcement Bureau has certainly failed to satisfy the stringent test for doing so under relevant precedent Third, the Motion is, and can only be, a Motion to enlarge or change an issue under Section 1.229 of the Commission's rules,[13] and the Enforcement Bureau has utterly failed to satisfy the requirements of that rule Fourth, notices of apparent liability do not constitute final orders and thus cannot be relied upon as precedent as a matter of law Fifth, the *Globcom NAL* contains significant errors that may result in its dismissal, and certainly render it unusable in this case.

---

[12] *See Globcom NAL* at ¶ 27

[13] *See* 47 C F.R § 1 229 (2002)

Finally, the proposed increase in the Base Forfeiture amount is not warranted in this case, and would also be arbitrary, capricious and excessive.

I The Motion Does Not Satisfy the Administrative Procedure Act's Notice Requirements and Violates Fundamental Principles of Fairness

As Chief Administrative Law Judge Sippel noted in the *November 5th Hearing*, the Enforcement Bureau's Motion is not only "difficult on the opposing party," but also implicates "the basics of notice and fairness and everything that was done back in 1942 . by this great Commission and the committee that put the APA together "[14]

The Enforcement Bureau has conceded that the *Globcom NAL*, by its own terms, represents a significant policy change for the Commission vis-à-vis the enforcement action it intends to take on a going-forward basis against carriers that fail to file reports and contribute to universal service and TRS mechanisms In the *November 5th Hearing*, which was instituted purely at the request of the Enforcement Bureau, the Enforcement Bureau expressly conceded that the *Globcom NAL* constitutes a policy change on the part of the Commission

Chief ALJ Sippel· Did I hear you right in saying that Globcom, then, that constituted what you stated is a policy change?

Mr. Shook Yes [15]

The *Globcom NAL* itself states

---

[14] *See Transcript* at 24.

[15] *See Transcript* at 22 - 24.

> Previously, even in cases of longstanding failures to pay universal service contributions, we assessed forfeitures on only a portion of the violations Thus, in *ConQuest*, we assessed a forfeiture only for a single month of nonpayment, even though the carrier had been delinquent for more than eight months Approximately one year later, we assessed forfeitures for two months of nonpayment ***More than three years have passed since the ConQuest decision, and the time has come to implement a substantially greater forfeiture amount in order to deter carriers from violating our universal service contribution and reporting rules.***
>
> The present case clearly demonstrates that ***our prior method of assessing forfeitures has not adequately deterred carriers*** from violating our universal service contribution and reporting rules Therefore, we are now increasing the number of months of nonpayment on which we assess the forfeiture amount We will now propose substantial forfeitures for each of Globcom's universal service-related violations within the past year [16]

In short, in its *Globcom NAL* the Commission announced a policy change, pursuant to which it proposes to dramatically increase its established forfeiture penalties in the hopes of deterring future carriers from failing to comply with its universal service reporting and contribution rules The Enforcement Bureau now seeks to retroactively apply the new policy announced in the *Globcom NAL* to this case in violation of the Retroactivity Doctrine described below. The Retroactivity Doctrine is derived from fundamental notions of fairness and equity.[17] The APA, itself imposes a fairness principle requiring that a party to an adjudicatory proceeding be advised of the facts and law asserted.[18] Such fair notice is critical because it dictates a party's conduct throughout the course of an entire adjudicatory proceeding with respect to discovery, litigation

---

[16] *Globcom NAL* at ¶¶ 25 - 26 (emphasis added)

[17] *See* Cassell v FCC, 154 F.3d 478, 486 (D.C. Cir. 1998) (*"Cassell"*).

[18] *See* Rapp v U S Dept of Treasury, 52 F.3d 1510, 1519-1520 (10th Cir. 1995) *See also* 5 U S C. § 554(b)(3) (2002)

strategy, settlement negotiations, etc

As explained more fully below, Commission precedent is quite clear on the appropriate forfeiture penalty that should be applied in cases involving carriers that fail to contribute to universal service mechanisms Through its Motion, the Enforcement Bureau seeks, shortly before trial, to apply a newly announced, but not yet final (or tested), policy change of the Commission ***that would increase the maximum potential penalty by nearly $1,000,000 over what was previously permitted*** The Motion should be denied for a host of reasons described herein. Most importantly, it violates "notions of equity and fairness "[19]

The Enforcement Bureau's motive in filing the Motion is insidious When the *Show Cause Order* was issued, the Enforcement Bureau's core allegation was that Business Options made misrepresentations or violated its duty of candor to the Commission The evidence has not supported that claim Facing a loss on its primary claim, the Enforcement Bureau filed its *Motion to Enlarge Issues*, in which it sought to bring universal service issues to the forefront of this case But the Commission's forfeiture precedent for failure to pay universal service contributions is well defined, and the Enforcement Bureau appears to have decided that the maximum forfeiture it could impose was inadequate for its purposes. In short, the Enforcement Bureau quickly fabricated the *Globcom NAL*, then sought to retroactively apply it to Business Options, to salvage its case. This cannot be allowed

[19] *See Cassell* at 486

II The Motion Impermissibly Seeks to Retroactively Apply a Commission Policy Change

The Enforcement Bureau's attempt to retroactively impose the Commission's newly enunciated forfeiture standard for failure to contribute to universal service support mechanisms is improper and violates established precedent

The D C Circuit examined the so-called Retroactivity Doctrine in its recent *Verizon* decision.[20] In *Verizon*, the D.C Circuit stated that the Retroactivity Doctrine "is a robust doctrinal mechanism for alleviating the hardships that may befall regulated parties who rely on 'quasi-judicial' determinations that are altered by subsequent agency action."[21] In analyzing these potential hardships, the D C Circuit discussed a series of cases addressing retroactive application of agency actions "the governing principle is that when there is a substitution of new law for old law that was reasonably clear, the new rule may justifiably be given prospectively-only effect in order to protect the settled expectations of those who had relied on the preexisting rule "[22]

In the instant case, the Enforcement Bureau's attempt to use the *Globcom NAL* retroactively cannot overcome the Retroactivity Doctrine's legal hurdles. Courts have often

---

[20] *See* Verizon Telephone Companies, et al v. FCC, 269 F.3d 1098, 1109 (D.C Cir 2001) ("*Verizon*")

[21] *See* id

[22] *See id* *See also* Williams Natural Gas Co v FERC, 3 F.3d 1544, 1554 (D.C. Cir 1993)

employed a five prong test in determining whether the Retroactivity Doctrine can be overcome,[23] and the Enforcement Bureau fails each prong. We take each in turn First is whether the particular case is one of first impression It clearly is not, as there are multiple cases addressing the appropriate forfeiture applicable to carriers that fail to contribute to federal universal service mechanisms Second is whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law The proposed new rule proposes a dramatic and abrupt departure from existing precedent, such that it would increase the maximum potential penalties twenty-fold. Third is the extent to which the party against whom the new rule is applied relied on the former rule. As discussed in greater detail herein, Business Options declined to oppose the Enforcement Bureau's *Motion to Enlarge Issues* because it understood the maximum penalties it faced under established precedent. Fourth, the degree of the burden which a retroactive order imposes on a party. Business Options would face penalties that are nearly $1,000,000 higher under the newly announced policy, a fine which it could not bear. Fifth, the statutory interest in applying a new rule despite the reliance of a party on the old standard The Enforcement Bureau and the Commission have nothing to gain (except communicating to industry participants that the system can act irrationally). If they prevail on the legal issue, they would have a favorable precedent, and they still would be entitled to assess a forfeiture consistent with applicable law

---

[23] *See* Retail, Wholesale & Dep't Store Union v NLRB, 466 F.2d 380, 390 (D C Cir. 1972).

In short, despite the Enforcement Bureau's vacuous attempt to characterize its Motion as seeking clarification of an issue, it in facts seeks to retroactively substitute a newly proposed rule for an existing one The Enforcement Bureau admitted as much. In such a case denial of retroactive application of the new rule is mandated [24] As articulated by Justice Scalia "Adjudication has future as well as past legal consequences, since the principles announced in an adjudication cannot be departed from in future adjudications without reason "[25] The Enforcement Bureau is attempting to do just that, and it should not be permitted.

III The Motion Is An Untimely Motion to Enlarge or Change an Issue, and the Enforcement Bureau Has Utterly Failed to Satisfy the Test for its Consideration

By styling its Motion a "motion to clarify an issue," the Enforcement Bureau has not treated this tribunal to a fair assessment of the issues The Motion does not seek to clarify anything, and characterizing it as such is simply improper The Enforcement Bureau seeks only to substitute a new policy announced by the Commission for the old policy in effect at the time the *Show Cause Order* and *Motion to Enlarge Issues* were issued The only possible proper procedural vehicle for such an attempt is the filing of a motion to enlarge or change an issue under Section 1 229 of the Commission's rules [26] Clearly, the Enforcement Bureau examined the prescriptions of that rule and decided that it could not satisfy them Notably, ***the Enforcement***

---

[24] *See Verizon* at 1109 (citation omitted).

[25] *See* Bowen v Georgetown Univ Hospital, 488 U.S. 204, 216-217 (1988).

[26] *See* 47 C F.R § 1 229 (2002)

Bureau does not even cite any enabling rule for the instant Motion, since there is none

Rather, in a footnote the Enforcement Bureau states that the Motion "follows"[27] the *November 5th Hearing* and subsequent order setting a procedural schedule for briefs ("*Order FCC 03M-47*").

While the Enforcement Bureau does not advance the argument that *Order FCC 03M-47* authorized the filing of the instant Motion (as it reasonably could not) it suggests as much But this is not the case In both *Order FCC 03M-47* and in the *November 5th Hearing*, Chief Administrative Law Judge Sippel expressed grave concern regarding the "adequacy and timeliness"[28] of the issues raised in the Motion: "we have ex post facto issues. We've got notice issues We've got all kinds of issues here "[29] Accordingly, Chief Administrative Law Judge Sippel stated that he is "certainly not going to give a bench ruling"[30] on the issues, and the only logical course would be to set a briefing schedule.[31] Initially, Chief Administrative Law Judge Sippel stated that "we probably ought to treat this as a motion to amend," but then stated that

---

[27] *See* Motion at FN 1

[28] *Business Options, Inc* , Order, FCC 03M-47 (rel Nov 7, 2003).

[29] *Transcript* at 37

[30] *Id*

[31] *Id* at 32

the Enforcement Bureau was "entitled to its rights" in terms of titling its Motion.[32] The Enforcement Bureau ***has no right*** to file a motion to clarify an issue here -- the rules simply do not provide for such a thing The rules do provide, however, for motions to enlarge or change issues. The Enforcement Bureau cannot simply opt-out of the prescriptions of that rule by titling its Motion something other than what it is.

Even if the Enforcement Bureau were to have styled its Motion a motion to enlarge or change an issue under Section 1.229 of the Commission's rules, the Motion still must fail Section 1.229 states that motions to enlarge or change issues must be filed within 15 days after the order designating the case for hearing has been published in the *Federal Register*, or, if based on newly discovered facts, within 15 days after such facts are discovered (movants must show with specificity that new facts gave rise to the new claim) [33] Section 1 229(b)(3) states that such motions shall be granted only for good cause shown for the delay [34] In the absence of good cause for the late filing, "the motion to enlarge will be considered fully on its merits if (and only if) initial examination of the motion demonstrates that it raises a question of probable decisional significance and such substantial public interest importance as to warrant consideration in spite

---

[32] *Id* at 38-39

[33] *See* 47 C F R § 1 229(b) (2002).

[34] *See* 47 C F R § 1.229(b)(3) (2002).

of its untimely filing" (the "Exception") [35] The Motion clearly fails each prong of the test outlined in Section 1 229 of the Commission's rules as well as the Exception

First, the *Show Cause Order* was published in the *Federal Register* on April 29, 2003, so a motion to enlarge or change an issue would clearly be untimely.[36] The Enforcement Bureau has not even alleged, as it could not, that there are any new facts that give rise to the instant Motion Indeed, it is a substitution of newly announced policy that is at issue. Thus, it is beyond dispute that the Enforcement Bureau fails the first two prongs of the test.[37]

As for the Exception, the Enforcement Bureau does not even come close to satisfying it There is neither "a question of probable decisional significance" nor a "substantial public interest" consideration at issue here As explained more fully below, the *Globcom NAL* is not a final order It has not yet been tested at any level, either through the adjudicatory process applicable to notices of apparent liability or in any other way Second, the *Globcom NAL* contains grave errors that may result in its dismissal, and certainly warrants its modification.

[35] 47 C F R. § 1.229(c) (2002)

[36] *See* 68 FR 22699 (2003)

[37] Notably, despite Business Options' non-opposition, the Enforcement Bureau's first *Motion to Enlarge Issues* failed the first two prongs as well. First, it was late filed. Second, the Enforcement Bureau argued that its *Motion to Enlarge Issues* was based on newly discovered facts, *i e* , that Business Options failed to contribute to federal universal service mechanisms This argument was found to be implausible since the Commission had already alleged in the *Show Cause Order* that Business Options failed to file its Telecommunication Reporting Worksheets, which are used to calculate universal service obligations. The *Motion to Enlarge Issues* was granted, however, under the Exception.

Third, there is an entire doctrine of administrative law that strongly disfavors retroactive application of policy changes Finally, the Enforcement Bureau's position will in no way be compromised through denial of the Motion If successful, the Enforcement Bureau would still prevail on the issue itself (failure to properly report and contribute to federal universal service and TRS mechanisms), and would still be entitled to assess a forfeiture That forfeiture would merely have to be consistent with existing policy, as opposed to the radically new policy that would dramatically increase the maximum possible forfeiture.

In short, the Motion is irretrievably deficient from a procedural standpoint, and thus should be rejected on those grounds alone Even if the substantive flaws in the Motion were to be considered, the Motion would still fail

IV **The Globcom NAL Is Not a Final Order and Cannot Be Used as a Precedent**

The Commission has conclusively found that notices of apparent liability do not constitute final orders [38] According to the Commission, since notices of apparent liability are not final they are not subject to petitions for reconsideration,[39] and thus they are not subject to judicial review [40] In short, the phrase "notice of apparent liability" says it all -- it is merely a

---

[38] *See Notice of Apparent Liability for Forfeiture of KGNT, Inc ; Licensee of FM Broadcast Station KGNT(FM), Smithfield, Utah, Facility ID #38274*, Forfeiture Order, 16 FCC Rcd 4656, 4658 (2001) at FN 8

[39] *See id*

[40] *See* 47 C F R. § 1.106 (2002)

notice (and thus not a final order), and it is of apparent liability (meaning that liability may not be imposed at all, or the proposed remedy may be wholly inappropriate) In short, until such time as a final order is issued, a notice of apparent liability cannot be used as precedent, and a proposed policy change contained in a notice of apparent liability is not Commission policy -- just as a proposed rule in a notice of proposed rulemaking does not constitute an effective rule. Indeed, in the rulemaking context proposed rules are often rejected in their entirety, modified substantially, or adopted.

Attempted reliance on the *Globcom NAL* is particularly inappropriate. First, it was just issued, and the initial response to it was due on November 21, 2003. Thus, it has not yet been subjected to the rigors of the adversarial process Second, and as explained more fully below, in the *Globcom NAL* the Commission misrepresented its own precedent, perhaps inadvertently, in a way that resulted in a proposed forfeiture that is far in excess of what the *Globcom NAL* purports to seek Third, application of the *Globcom NAL* as precedent in this case would effectively disserve the public interest by conveying inherent instability and unreliability of the law in Commission enforcement proceedings Since the *Globcom NAL* is not a final order, and since it is inherently unreliable, the policy change announced in it should have no bearing in this case.

V The Globcom NAL Contains Significant Errors That May Result in Its Dismissal, and Certainly Render it Unusable in This Case

In the *Globcom NAL*, the Commission misapplied its own precedent By way of background, in a series of cases, the Commission has set forth its methodology for imposing forfeitures on carriers that fail to properly contribute to federal universal service support mechanisms [41] As mentioned above, the prevailing methodology is as follows: a base forfeiture of $40,000 ($20,000 for each "of two months of nonpayment"),[42] plus ***"an amount that is approximately one half of the unpaid universal service contributions for two representative months"*** (the "Additional Penalty") [43]

In the *Globcom NAL*, the Commission proposed to dramatically increase its standard Base Forfeiture from $40,000 to $240,000 The Commission discussed this charge at great length. In a single sentence which misquoted and misapplied its own precedent, however, the Commission also proposed a second dramatic increase in the standard Additional Penalty This error may very well have been the result of inadvertence, since it would clearly be impermissible for the Commission to dramatically alter its precedent absent any notice or discussion

---

[41] *See infra* note 9

[42] *Globcom NAL* at ¶ 25

[43] *See PTT Telekom, Intellicall, America's Tele-Network Corp, Matrix,* and *North American Telephone Network*

Specifically, in the *Globcom NAL* the Commission states, citing its existing precedent, that the established Additional Penalty is "one half of the unpaid universal service contributions," and left off "for two representative months."[44] Accordingly, the Commission proposed an Additional Penalty of one half of the ***total amount billed*** Globcom, rather than one half of the amount owed for ***two representative months*** As discussed above, Commission precedent is clear that the forfeiture "for nonpayment of its universal service contributions consists of two components"[45] – the Base Forfeiture and the Additional Penalty. In the NAL, the Commission expressly stated that it was seeking to increase the Base Forfeiture from $40,000 to $240.000 (which appears to be unwarranted and would be arbitrary, capricious, and excessive), but made no mention of the fact that it sought to alter the standard Additional Penalty Accordingly, the Commission set forth no factual or legal basis for a departure from Additional Penalty precedent

Thus, even if it were determined that the *Globcom NAL* were to apply here (which would be improper as a matter of law), a significant downward adjustment of the forfeiture penalty would still be required, consistent with Commission precedent Specifically, even if it were found that an Additional Penalty is warranted in this case, the maximum amount of the

---

[44] *See Globcom NAL* at ¶ 27.

[45] *Id*

Additional Penalty would ***be one half of the actual amount owed for two representative months***

We further note that the *Globcom NAL* was predicated on erroneous facts due to a reporting error However, these issues will not be borne out in their entirety until after the evidentiary process in the Globcom proceeding is undertaken In short, the *Globcom NAL* contains serious errors and is based on erroneous facts, and there is a distinct possibility that it will either be dismissed in its entirety, or significantly altered. Because of its inherent unreliability, it cannot be used here

VI. The Proposed Increase in the Base Forfeiture Amount is Not Warranted in This Case, and Would Also Be Arbitrary, Capricious and Excessive

Based on the facts of this case which reflect that Business Options was simply unaware of its filing and payment obligation, the Commission's proposed increase in its Base Forfeiture amount from a maximum of $40,000 to $240,000 in this instance would be arbitrary and capricious, and would be excessive in light of the base forfeiture penalties assessed on similarly-situated carriers The evidence will reveal that Business Options did not intentionally violate the Commission's rules Thus, an upward departure from previous forfeiture precedent is not warranted, and is not in the public interest Business Options contends that a downward adjustment or cancellation of the proposed forfeiture in its entirety is appropriate

Moreover, even under the facts as set forth in the *Show Cause Order* and *Motion to Enlarge Issues*, the Enforcement Bureau provided no compelling reason why this case presents circumstances that warrant deviation from the standard forfeiture penalty it established on